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PROCEEDINGS AND ORDERS

DATE: 112486

CASE NBR 86-1-00283 CSX
SHORT TITLE Cox, Sylvia L.
VERSUS Cox, Thomas C.

DOCKETED: Aug 20 1986

Date	Proceedings and Orders
Aug 20 1986	Petition for writ of certiorari filed.
Aug 20 1986	Appendix of petitioner Sylvia L. Cox filed.
Sep 12 1986	Order extending time to file response to petition until October 20, 1986.
Oct 16 1986	Brief of respondent Thomas C. Cox in opposition filed.
Oct 22 1986	DISTRIBUTED. November 7, 1986
Nov 10 1986	REDISTRIBUTED. November 14, 1986
Nov 17 1986	Petition DENIED. Dissenting opinion by Justice White with whom Justice O'Connor joins. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

86-283

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

SYLVIA L. COX,

Petitioner,

VS.

THOMAS C. COX,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT DIVISION THREE

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No. _____

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SYLVIA L. COX,

Petitioner,

VS.

THOMAS C. COX,

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PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA, FOURTH APPELLATE DISTRICT

DIVISION THREE

QUESTIONS PRESENTED

1. Whether the Federal Uniformed Services Former Spouse's Protection Act[1] was intended to completely abolish all applications of McCarty v. McCarty [2] and to apply retroactively, with the special intent of restoring pension benefits denied in cases decided during the 20 month period after McCarty and before the Act became effective.

2. Whether retroactive application of the Act was intended only in cases pending when the act became effective, or also includes the reopening of divorce judgments which became final during the 20-month period between McCarty and the effective date of the Act.

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1 10 U.S.C. sec. 1408.
2 453 U.S. 210, (1981).

3. Whether the Act was intended to empower state courts to permit retroactive application of the Act to include re-opening final judgments, either under existing laws, or new legislation in order to restore pension benefits lost in cases decided during the 20-month period after McCarty v. McCarty and prior to the Act.

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///

OPINIONS BELOW

Petitioner appealed from the denial by the trial court of two motions to reconsider a final judgment of dissolution. (June 1, 1983 and February 24, 1984, R.C.T. 22, O.C.T. 37)* The published opinion by the Court of Appeal, State of California, Fourth Appellate District, Division Three, was filed on February 28, 1986, modified March 26, 1986, in case numbers G001329 and G000326.

The order by the California Supreme Court denying hearing and ordering that the opinion not be published was filed May 22, 1986. A copy of the opinion of the Court of Appeal and the order of the California Supreme Court is included as Appendix 1 and 2.

---

* Citations are to Minute orders in the trial court.

GROUNDS FOR JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 USC section 1257(3) on the ground that her rights and interests under 10 U.S.C. sec. 1408 were violated. Petitioner asserts that she is entitled under this provision to claim her rightful share of her spouse's military retirement benefits denied her under McCarty v. McCarty.

The Court of Appeal construed the Act so as to deny her retroactive claim to benefits. The court also held that a state statute permitting retroactive claims based upon the Act violated the federal supremacy clause and was therefore unconstitutional. The instant Petition for Writ of Certiorari is filed within 90 days of the order denying hearing by the California Supreme Court.

CONSTITUTIONAL PROVISION

The pertinent provision in 10 U.S.C. sec. 1408 provides as follows:

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court."

The complete provision is set out verbatim in Appendix 3.

STATEMENT OF THE CASE

Petitioner Sylvia Cox and Thomas Cox were married for twenty-six years and five months. During twenty years of the marriage, Thomas Cox was an active duty member of the United States Marine Corps. Respondent retired and began receiving a military retirement pension.

The parties' marriage was dissolved by a final decree on January 28, 1982. (R.C.T. 7, O.C.T. 7). * The judgment ordered that Respondent's military retirement pension was his separate property under then current law, McCarty v. McCarty decided June 25, 1981. (O.C.T. 4, R.C.T. 4).

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* All citations in parenthesis, other than those referring to cases or statutes refer to pages in the Appendix or to pages from the court file as follows: Clerk's Transcript, Judge Rutter (R.C.T.), Clerk's Transcript, Judge Owen. (O.C.T.).

In response to the decision in McCarty, Congress enacted the Federal Uniformed Services Former Spouse's Protection Act (10 U.S.C. sec. 1408), effective date February 1, 1983. (Hereinafter referred to simply as the Act). The Act purported to nullify the McCarty decision and return jurisdiction over military retirement pensions to the states.

Thereafter, Petitioner filed the first of two motions on March 30, 1983, to set aside the judgment as to the portion allocating the pension as Respondent's separate property. (O.C.T. 9). This motion was based upon the apparent purpose of the Act to reinstate military pensions as community property to those spouses who divorced during that 20 month period between McCarty and the effective date of the Act. (O.C.T. 13-17).

Petitioner filed a second motion requesting the same relief on January 13, 1984, based upon California Civil Code section 5124 which makes the apparent retroactive intent of the Act operative. (R.C.T. 16, Appendix 4).

Both motions were denied and Petitioner appealed to the Court of Appeal. (R.C.T. 22, 23, O.C.T. 37, 46). The Court of Appeal held that the Act was retroactive only to those cases pending on the effective date of the Act and did not apply to cases which became final during the 20-month interim between McCarty and the Act.

The court held that those cases were still controlled by this Court's decision in McCarty v. McCarty. Therefore, the court held, California Civil Code section 5124 is unconstitutional because

it seeks to override McCarty and thus violates the supremacy clause of the federal constitution. (Appendix 1, page 13-14).

The dissenting opinion held that the Act was retroactive to the McCarty decision and was intended to empower states to treat military pensions according to state law. Therefore, California Civil Code section 5124 which permits reopening of final judgments, was contemplated by the Act and was constitutional. (Appendix 1, p. 18, 26).

Petitioner sought review of the Court of Appeal decision in the California Supreme Court. The Supreme Court denied review on May 22, 1986, and ordered that the opinion not be published in the official reports. (Appendix 2).

REASONS FOR GRANTING THE WRIT

I.

CONGRESS INTENDED THE FORMER SPOUSE'S PROTECTION ACT TO END ALL APPLICATIONS OF McCARTY AS WELL AS TO PROVIDE A REMEDY TO CASES DECIDED UNDER McCARTY.

A. Introduction

California decisions following the Act are in hopeless disarray, with some cases construing the Act to be retroactive to all cases, final or not, while other courts, such as in this case, hold that the Act forbids reopening final judgments and that McCarty is still viable.

The following argument and discussion will demonstrate that the disparity in treatment of cases by California courts

has created chaos and conflict in the state courts and is inconsistent with other jurisdictions. As a result, an urgent problem has developed whereby some former military spouses are allowed to reopen final judgments and share in pension benefits while others are not.

B. Background and Purpose of the Act.

California law prior to this Court's decision in McCarty v. McCarty (1981) 453 U.S. 210, decided June 26, 1981, had long held that military retirement pensions acquired during marriage were subject to division as community property upon dissolution. In re Marriage of Fithian (1974) 10 Cal.3d 592.

However, in McCarty, this Court declared that a different rule was to be applied and that federal law was applicable to division of military pensions. Further,

this Court held that military pensions belonged exclusively to the military spouse.

In response to the uproar caused by the McCarty decision, Congress enacted the Federal Uniformed Services Former Spouse's Protection Act, 10 U.S.C. sec. 1408, effective date, February 1, 1983. The Act empowered the various states to characterize military pensions "either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. section 1408 (c)(1).)

Legislative comment addressing section 1408(c)(1) stated the purpose of the Act as follows:

"The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the McCarty decision, with res-

pect to treatment of non-disability military retired or retainer pay. This power is returned to the courts retroactive to June 26, 1981.

This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision". 1982 U.S. Code Cong. & Ad News 1555, 1611. (Emphasis added).

Based thereon and in order to ensure a remedy to those spouses whose dissolution decrees had become final after McCarty and before the effective date of the Act, California enacted Civil Code section 5124. This section provides that community property judgments which became final after June 25, 1981 and before February 1, 1983 could be modified to include a division of military retirement benefits as was the law prior to June 26, 1981. (Appendix 4).

C. Conflict Over Extent of Retroactivity

There can be no doubt that Congress intended to end the rule announced in McCarty and to return power to the states to divide military pensions. However, courts are in disagreement on the issue of whether Congress also intended a remedy to all cases decided in the interim 20-month period following the McCarty decision and prior to the effective date of the Act.

The Court of Appeal below and several other California courts have held that Congress did not intend the Act be applied retroactively to McCarty judgments which had become final before the Act's effective date. (Appendix 1, p. 9-10). Inre Marriage of Fairfull (1984) 161 Cal.App.3d 532, In re Marriage of Hopkins (1983) 142 Cal.App.3d 350. In both Fairfull and Hopkins, the

cases were still pending on the effective date of the Act and thus the military retirement pensions were divided according to prior California law. The courts in both Fairfull and Hopkins found that the Act itself was retroactive to the McCarty decision and that it would be inequitable not to apply its corrective effects to the cases then pending. (Hopkins, at p. 359-360, Fairfull at p. 535).

Other cases which are substantially in agreement with this rule are In re Marriage of Lockstrom (1983) 148 Cal.App.3d 675, In re Marriage of Ankenman (1983) 142 Cal.App.3d 833, In re Marriage of Sarles (1983) 143 Cal.App.3d 24. Since the judgment was not final in each of the above cases, the court in each case permitted the remedy sought by the wife.

In contrast, two California courts have held that regardless of the above cases, California Civil Code section 5124 permits a remedy in those cases which became final under McCarty. For example in Mueller v. Walker (1985) 167 Cal.App.3d 600, the court held that even though some cases found that the Act was not retroactive to final judgments, section 5124 explicitly allowed the wife to reopen the judgment and divide husband's military retirement pension as a community asset. The pension had been previously awarded to husband as his separate property. (Id., at p. 609).

Furthermore, the court in Mueller held, section 5124 is a proper exercise of police power and carries out the intent of the Act to allow recovery and redivision of community property. (Id., at p. 609). An identical holding based upon

similar facts was reached in In re Marriage of Potter(1986) 179 Cal.App.3d 73.

Moreover, other jurisdictions have reached results similar to Potter and Mueller, but contra to Fairfull, Hopkins, Ankenman, Sarles and Lockstrom. For example in Edsall v. Superior Court (1984) 143 Ariz. 240, the Supreme Court of Arizona held that a final dissolution decree could be reopened in order to allow a wife to reclaim her community property share of husband's military pension denied to her under McCarty. The court here held that Arizona law permitted a reopening of the judgment under an existing provision in cases where "it is no longer equitable that the judgment should have prospective application or any other reason justifying relief from the operation of the judgment." (Id., at p. 243).

The Edsall court held that Congress intended the Act to be retroactive in order to afford individuals who were divorced during the interim period a chance to return to the courts to take advantage of the provision. (Id., at p. 244). This is in keeping with the intent of Congress to "wipe out the effects of McCarty on persons divorced during the interim period." (Id., at p. 243).

Similarly, in Smith v. Smith (1983) 458 A.2d 711, a Delaware court also held that the intent of the Act was to rectify the damage done to a special category of people whose cases were decided under McCarty. Here, a wife was permitted to reopen a final judgment under an existing state law provision similar to the one in Edsall, supra, in order to redivide husband's military

retirement pension. (Id., at p. 712, 713).

In Burton v. Burton (1983) 669 P.2d 703, the Nevada Supreme Court without deciding whether the Act was retroactive permitted the reopening of a final dissolution decree based upon a new state law similar to California Civil Code section 5124. The court in Burton held that the new law permitted wife to seek retroactive division of military retirement benefits.

The Court of Appeal below has reached a decision which differs markedly from other authorities discussed above. Here, the court was presented with a case where the judgment, decided under McCarty had become final. As in Hopkins, Fairfull and several other cases, the court held that the Act was

not retroactive except to those cases still pending when the act became effective. However, unlike Mueller and Potter, the court below refused to apply California Civil Code section 5124 to permit a reopening of the judgment. (Appendix 1, p. 9, 13, 16).

The court below found that the intent of Congress was that the Act should not apply retroactively and that Congress intended that McCarty still retain some vitality. In support of this argument the court's opinion cites the following statement from the Congressional record:

"The House Amendment would apply to court orders finalized before the McCarty decision, but not to subsequent modifications thereto which have the effect of implementing the holding in the McCarty decision (for example, divesting a former spouse of a previously awarded right to a portion of a member's retired pay)..."

(J. Explanatory Statement of the Com. of Conf. on Sen. No. 2248 from the House Conf. Rep. No. 97-749, Aug. 16, 1982, p.

5999, 128 Cong. Rec. (1982). (Appendix 1, p. 10).

The court's interpretation of Legislative intent cannot be supported by this statement. The statement referred to by the court is clearly concerned with the possibility that pre-McCarty judgments might be reopened to take advantage of McCarty's rule. Congress intended by these comments to demonstrate that McCarty had no vitality and was a nullity in every sense.

The Court of Appeal opinion below construing the Act to retain some aspects of McCarty is also in conflict with other California cases which hold that McCarty was rendered moot by the Act. In re Marriage of Buikema (1983) 139 Cal.App.3d 689, In re Marriage of Frederick (1983) 141 Cal.App.3d 876. In Frederick, the court denied husband's

motion to set aside a judgment rendered prior to McCarty dividing husband's military pension. The court held that the enactment of the Uniformed Services Former Spouse's Protection Act had rendered moot the dispute since there is no longer any McCarty rule to be retroactively applied. (Id., at p. 880).

The above discussion and authorities demonstrate that the intent of Congress in enacting "FUSFSPA" was to abolish all applications of McCarty and to repair the seamless web of pre-McCarty law as though never torn asunder. (Frederick, supra, at p. 879). In addition to ending the McCarty rule since the effective date of the Act, it is clear from Legislative comments that Congress intended the Act to provide a remedy to those few cases already final prior to the effective date of the Act.

This interpretation is consistent with federal law and the law of this state as it existed before June 26, 1981 and since February 1, 1983. The strong public policy favoring the fair and equitable division of community property upon dissolution of marriage demands that the Act be interpreted to include those cases decided in the interim period. Otherwise, extraordinary hardship and injustice to this special category of people will result.

///

CONCLUSION

For the foregoing reasons, Petitioner Sylvia Cox, requests that this Court grant a hearing and reverse the opinion of the reviewing court below.

Dated: August 19, 1986

RESPECTFULLY SUBMITTED,

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NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1986

SLYVIA L. COX,	)
Petitioner,	)
vs.	)
THOMAS C. COX,	)
Respondent.	)

CERTIFICATE OF SERVICE

I hereby certify that on this date I have served a copy of the Petition for Writ of Certiorari by depositing it in the U.S. Mail, first-class postage prepaid, at Irvine, California, and addressed to:

Clerk, Orange County Superior Court
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Clerk, Supreme Court of California
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I further certify that all parties required to be served have been served.

Dated: August 20, 1986

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APPENDIX

86-283

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

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Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF THE STATE OF

CALIFORNIA, FOURTH APPELLATE DISTRICT

DIVISION THREE

APPENDIX 1

CERTIFIED FOR PUBLICATION
(FILED FEB 28, 1986)
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

In re Marriage of Sylvia L. and Thomas C. Cox	)	
SYLVIA L. COX,	)	
Appellant,	)	G000326
v.	)	Super. Ct. No. C-47602
THOMAS C. COX, Respondent.	)	OPINION

Consolidated appeals from post-judgment orders of the Orange County Superior Court. J.E.T. Rutter and Ronald E. Owen, Judges. Affirmed.

Elekes & Hodges and John S. Elekes, Jr. for Petitioner.

James E. Sutherland for Respondent.

The issue presented in this consolidated appeal is whether the California

Legislature may retroactively override a pronouncement of our United States Supreme Court.

* * *

The parties' 26 year marriage was terminated by a final decree of dissolution entered on January 28, 1982. Husband, a retired military officer, was awarded his non-disability retirement pension as his separate property. On March 23, 1983 wife filed a motion to set aside that portion of the interlocutory decree which had awarded the retirement pension to husband in order that part thereof be awarded to her as community property. She contended the then recently enacted Federal Uniformed Services Former Spouse's Protection Act[1/] authorized the states to treat military retirement pay as community property and that the Act was to be

applied retroactively to final judgments. The motion was denied and wife appealed.

In January 1984 wife filed a second, similar motion, this time relying on recently enacted Civil Code section 5124.[2/] That motion was also denied and again wife appealed. We have consolidated the appeals.

After In re Marriage of Fithian (1974) 10 Cal.3d 838, California trial courts characterized non-disability retirement pension interests acquired during coverture as community property subject to division upon dissolution. However, on June 26, 1981, the United States Supreme Court in the now famous McCarty[3/] decision declared a different rule must be applied. It proclaimed federal law was applicable to the distribution on dissolution of all military

non-disability retirement pension interests. It further declared the pension, with all its rights and interests, belonged exclusively to the military spouse.

Congress, in response to a perceived unfairness in the McCarty rule, enacted FUSFSPA twenty months later. That Act empowered the various states to characterize non-disability military retirement pay "either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. sec. 1408(c)(1).)

The only reported California decision to address the issue(Mueller v. Walker (1985) 167 Cal.App.3d 600) has concluded Congress did not intend FUSFSPA be applied retroactively to

McCarty judgments which had become final before FUSFSPA's effective date. While we agree with that general proposition, we reject Mueller's result and find its reasoning on this issue unpersuasive.

The trial court in the Muellers' dissolution action had followed McCarty and had awarded to husband as his separate property his non-disability military retirement pension. That decree became final in October 1982. Wife subsequently filed suit to establish a community property interest in her former spouse's military pension benefits. The trial court sustained husband's demurrer (brought on res judicata grounds) without leave to amend and dismissed the action.

The Mueller court reversed the judgment of dismissal after having determined Civil Code section 5124

clearly authorized the remedy wife sought. (Mueller v. Walker, supra, 167 Cal.App.3d at p. 607.) The Civil Code section 5124 discussion was necessary because the court had initially concluded, without further analysis, "FUSFSPA has been held applicable only to those cases not yet final as of its effective date, i.e., February 1, 1983." (Id., at p. 605.) However, the authorities Mueller cites for this proposition (In re Marriage of Fairfull (1984) 161 Cal.App.3d 532 and In re Marriage of Hopkins (1983) 142 Cal.App.3d 350) both involve non-final McCarty decrees which were pending on FUSFSPA's effective date. Consequently, we examine the retroactivity issue anew.

Whether a statute operates retrospectively or prospectively only is entirely referable to legislative

intent. (Hassett v. Welch (1938) 303 U.S. 303.) Courts have long employed a rule of strict construction against the retrospective operation of statutes. (E.g., United States v. The Peggy (1801) 5 U.S.(1 Cranch) 103, 110). They will conclude a legislative body intended a statute operate retrospectively only where that intention is expressly stated (Murray v. Gibson (1853) 56 U.S.(15 Howard) 421, 423) or where the intent is "clearly, explicitly, positively, unequivocally, unmistakeably, and unambiguously shown by necessary implication or by terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof." (73 Am. Jur.2d, Statutes, 350, p. 487 and authorities cited [fns. omitted]; see also the authorities collected in

12B U.S. L.Ed. Digest, Statutes,sec.209, 213, pp. 349-351, 352- 353.) This rule of construction is particularly applicable where, as here, retrospective application would impair a vested right. (Ibid.)

FUSFSPA contains no express language it be applied retrospectively to final McCarty judgments, or to final judgments at all. In re Marriage of Downes (Feb. 3, 1983, A 028705) ___ Cal.App.3d ___ is supportive. That case involved a husband's appeal from Civil Code section 5124 orders reopening the parties' final 1982 dissolution decree and divesting husband of a portion of his military retirement pension which had been confirmed to him as his separate property. The Downes court reserved as premature the issues we decide today and reversed and remanded

the matter with directions to determine a preliminary factual issue not relevant to this appeal. However, the court did observe the following: "F.U.S.F.S.P.A. was not specifically made retroactive to apply to dissolution decrees that became final during the 'window' period between the time McCarty was decided and the date F.U.S.F.S.P.A. became effective. The California Legislature, however, enacted Civil Code section 5124 to make F.U.S.F.S.P.A. applicable to the window period so '[t]he parties therein would receive the same treatment given to similarly situated parties whose dissolution became final before McCarty or after the corrective federal law.' [Citation.]" (Fns. omitted.) (Ibid.)

Although the Act does authorize community property states to treat "pay payable to a member for pay periods

beginning after June 25, 1981 ... as [community property]" (10 sec. U.S.C. 1408(c)(1)), it is speculative to conclude Congress had more than pending cases in mind when it selected that language and chose to omit any reference to the statute's retrospective operation or to final judgments, McCarty or vested rights. (Compare Civ. Code, sec. 5124(a), fn. 2, supra.) Indeed, portions of FUSFSPA's legislative history suggest Congress intended McCarty retain at least some vitality: e.g., "The House Amendment would apply to court orders finalized before the McCarty decision, but not to subsequent modification thereto which have the effect of implementing the holding in the McCarty decision (for example, divesting a former spouse of a previously awarded right to a portion of a member's retired pay)...." (J. Explanatory

Statement of the Com. of Conf. on Sen. No. 2248 from the House Conf. Rep. No. 97-749, Aug. 16, 1982, p. 5999, 128 Cong. Rec. (1982). The full Statement as it pertains to FUSFSPA is set forth verbatim in the appendix.) We note Congress legislates with full awareness of the canons of statutory construction. (See, e.g., 2A C. Sandra, Sutherland Statutory Construction (4th ed. 1984), sec. 45.12, p. 55 and cases cited; see also Lorillard v. Pons (1978) 434 U.S. 575, 580, Cary v. Curtis (1845) 44 U.S. (3 Howard) 236, 240 and Lykes Bros. Steamship Co. v. United States (1972) 459 F.2d 1393, 1395.) We consequently decline to ascribe to the Act an application and operation Congress did not clearly intend.

The result we reach on this issue is also compatible with a recent obser-

vation of our California Supreme Court: "This [the drive to make McCarty disappear] pretty much reduced the impact of McCarty to judgments which became final between June 25, 1981, the date of that decision, and February 1, 1983, the effective date of FUSFSPA. The few unfortunate nonmember spouses whose judgments did became final between those dates, were given special permission by the California Legislature to ask that the judgments be modified 'to include a division of military retirement benefits payable on or after February 1, 1983,...' [Citation.]" (Aloy v. Mash (1985) 38 Cal.3d 413, 422, fn. 7.)

Despite her protestations to the contrary, our dissenting colleague is the sole California jurist to conclude Congress intended FUSFSPA be universally employed to invade and divest property

interests previously settled by final dissolution decrees. Such reasoning would render Civil Code section 5124 redundant. Indeed, the fact our Legislature enacted that section for the purpose of "mak[ing] F.U.S.F.S.P.A. applicable to the window period" (In re Marriage of Downes, supra, ___ Cal.App.3d ___) further supports our conclusion FUSFSPA is not retroactive to final McCarty decrees.

Since McCarty was a determination by our United States Supreme Court, it is the supreme law of this land for non-disability military pension awards finalized between June 26, 1981 and February 1, 1983. The court's characterization of those pensions as the service members' separate property is controlling. California Civil Code section 5124, which purports to allow those

final decrees to be reopened for a different determination, must yield to the supremacy clause of the United States Constitution. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U.S. Const., art. VI, sec. 2.) (See also Maryland v. Louisiana (1981) 451 U.S. 725, 746-747 and McCulloch v. Maryland (1819) 17 U.S. (4 Wheat) 316, 427.)

The dissent urges if FUSFSPA is not retroactive it should be construed as enabling the affected states to elect to follow McCarty or not as they might

separately choose. To the extent the Act might be so construed (which we also doubt for the reasons previously stated in this opinion) it would likely constitute an unlawful delegation of Congressional power to the legislatures of the various states. (See Knickerbocker Ice Co. v. Stewart (1920) 253 U.S. 149 and Wilkerson v. Rahrer (1891) 140 U.S. 545.) Federal statutes are to be construed so as to achieve a uniform result throughout the nation. (Reconstruction Finance Corp. v. Beaver County, Pa. (1946) 328 U.S. 204, 209.) It is entirely repugnant to our federal system of government that McCarty might be the law in some states but not in others. We are constrained to place upon FUSFSPA a construction which does not excise the supremacy clause from the United States Constitution. (See Blanchette v. Connecticut General Ins. Corps. (1974)

419 U.S. 102, 134; Turner v. Bd. of Trustees (1976) 16 Cal.3d 818, 827; County of Los Angeles v. Legg (1936) 5 Cal.2d 349, 353.)

In light of our determination we need not discuss the res judicata arguments raised by respondent. Nor do we attempt to rationalize the obvious differences in dispositions which occurred during the McCarty-controlled time period. We leave such discussion to those who chronicle the inequities of our less than perfect system. The orders are affirmed.

/s/ TROTTER
TROTTER, P.J.

I CONCUR:

/s/ WALLIN
WALLIN, J.

SONENSHINE, J., Dissenting.

If the majority's premise were correct, I would have no quarrel with its conclusion. A state legislature may not pass legislation directly in conflict with a holding of the United States Supreme Court. And if the United States Congress disallows retroactive application of remedial legislation, a state legislative body has no choice but to follow that directive. But, this is not our situation.

The United States Supreme Court in McCarty v. McCarty (1981) 453 U.S. 210 determined military non-disability retirement pension benefits belonged to the military spouse. In response, FUSFSPA was passed. Contrary to my colleagues' analysis, FUSFSPA was

intended to allow our state Legislature to enact Civil Code section 5124.

The majority opinion fails to recognize the clear and unequivocal message of FUSFSPA. Congress did not like McCarty and wished to eradicate any and all effects on the holding. The legislation was intended to allow the states to determine, for themselves, how they wished to characterize non-disability military retirement pensions. Thus, by virtue of FUSFSPA, no state could allow a party to benefit from McCarty by reopening a final judgment decided before it was rendered. All states could allow reopening of final judgments rendered after McCarty but before FUSFSPA. And lastly, for pensions payable after June 25, 1981, the states are free to determine for themselves how they wish to characterize

the pensions. The majority accepts the first and third conclusion, but refuses to acknowledge the second.

The majority suggests "Congress intended McCarty retain at least some vitality..." (Majority opn., ante, p. 7.) The passage cited by the majority supports a contrary conclusion. The conferees specifically noted "the conference report contains no prohibition against courts reopening decisions before [the date McCarty was decided]...[but] agreed that changes to court orders finalized before the McCarty decision should not be recognized if those changes were effected after the McCarty decision (and before the effective date of the new title X) to implement the holding in that decision (for example, a modification setting aside a pre-McCarty division of

military retired pay)." (Emphasis added.)

And why was this a concern of Congress? Not because Congress refused to condone reopening final judgments. Rather, Congress would not allow McCarty to govern a modification made during the window period, notwithstanding the fact McCarty was "the supreme law of this land [during the window period]." (Majority opn., ante, p. 8.) Rather than instilling a breath of life into McCarty, the FUSFSPA drafters intended the statute would "remove the effect of the United States Supreme Court decision in McCarty v. McCarty..." (Sen. Rep. No. 97-502, July 22, 1982, p. 1, as attached to the bill.)

The legislation itself applies to all cases pending after its enactment. "[A] court may treat disposable retired

or retainer pay payable to a member for pay periods after June 25, 1981 [the day before the McCarty decision was rendered], either ass property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. sec. 1408(c)(1), emphasis added.) I am not, as stated by the majority, "the sole jurist to conclude Congress intended FUSFSPA be universally employed to invade and divest property interests...." (Majority opn., ante, p. 8, emphasis added.) Rather, I am saying Congress envisioned the reopening of window period final judgments where courts had employed McCarty, if state law so provided.[1/]

The majority says the legislation itself must be explicitly retroactive. It is, when its legislative history is

considered. The Joint Explanatory Statement of the Committee of Conference intended Title X to "apply to court orders finalized on or after the McCarty decision as well as to subsequent modification." (See House Report attached to majority opn.) There is no prohibition against reopening decisions made on or after the date of the McCarty decision but before the passage of FUSFSPA. But, unlike pre-McCarty final orders, the statute is applicable to subsequent modifications of those final orders.

The fact Congress did not specifically refer to final judgments in section 1408(c)(1) is of no moment. Section 1006(b) notes federal remittance of retirement pay pursuant to a state court order "shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effec-

tive date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications." (Emphasis added.) Had Congress intended to dishonor modified post-McCarty final judgments, those judgments would have been included.

The Joint Committee Report notes, "The provisions adopted by the conferees are similar to the provisions of S. 1814 as reported by the Senate Armed Services Committee (Sen. Rep., 97-502). For the purpose of describing these similar provisions, the section-by-section analysis (p. 12-28) in the Senate report is referred to."

The Senate Report, on page 16, states, "The purpose of [sec. 1408(c)(1)] is to place the courts in the same position that they were in on June 26, 1981, the date of the McCarty decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State...laws.... This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced(or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage

of this provision." (Emphasis added.) The provision makes no distinction between final and appealable judgments rendered during the interim period.[2/]

"The question of whether previously entered court decrees should be modified to comply with the requirements of section 1408 of title 10 is one properly left for determination of courts having jurisdiction to make such modifications." (Sen. Rep. No. 97-502, p. 28.) Congress did everything in its power to eradicate all vestiges of the McCarty decision. It could not force the state courts to allow the reopening of judgments finalized in the interim period. That decision was left to the individual states as was the option to treat retirement pay "either as property solely of the member or as property of the member and his spouse in accordance with

the law of the jurisdiction." (Sec. 1408(c)(1), emphasis added.) California's Legislature chose to enact the corrective legislation permitted by Congress.

California law recognized retirement benefits as community property before the McCarty opinion. FUSFSPA merely returned that option to California. In order to remedy the inequity quickly and fairly, each state was allowed to treat decisions made final in the window period as it saw fit. Section 5124 follows Congressional intent.[3/]

In Mueller v. Walker, supra, 167 Cal.App.3d 600, the court decided the same issues raised by our parties.[4/] There wife moved for reconsideration of a final judgment awarding husband's military retirement pension to him as

his separate property. The underlying judgment was entered after McCarty and, as here, before FUSFSPA. The trial court denied her motion but the court of appeal reversed, holding section 5124 authorized the remedy sought by wife.

Husband urges there are several reasons not to follow Mueller. First he suggests "Mueller ignored the limiting language of section 5124 applying it only to cases where jurisdiction was reserved, the pension was omitted, or the judgment assumed that it was separate property." But the Mueller court ignored nothing. The very language of section 5124 allows "[m]odification of community property settlements, judgments, or decrees...whether or not the property settlement, judgment or decree expressly reserved the pension issue for further determination, [or]

omitted any reference to a military pension...." (Emphasis added.) In fact, the only limit Civil Code section 5124 establishes is that motions to modify final judgments must be made prior to January 1, 1986.

Next, husband argues res judicata principles prohibit the modification of a final judgment. He suggests the retroactive application of Civil Code section 5124 is unconstitutional because it authorizes a taking of property without due process. In other words, because of the finality of the judgment, the pension became the husband's vested asset. Thus, the issue is whether the Legislature can constitutionally ignore res judicata concepts.[5/]

Husband maintains the Mueller court improperly relied on In re Marriage of

Bouquet (1976) 16 Cal.3d 583 because the issue there was not modification of a final judgment, but addressed "all property rights, whenever acquired, that have not been finally adjudicated by a judgment from which the time to appeal has lapsed." (Id., at p. 594. emphasis added.)[6/] Husbands concerns are, for two reasons, unfounded. First, Bouquet is analogous to the extent vested rights are at issue. The concept of the finality of the judgment is merely a shorthand way of saying an asset belongs to one of the spouses. And that was the same concern with which the Bouquet court wrestled. "We must now determine whether the retroactive application of amended section 5118 constitutes an unconstitutional deprivation of the property of the wife." (Id., at p. 591.) And the court concluded: "Retroactive legislation, though frequently

disfavored, is not absolutely proscribed. The vesting of property rights, consequently, does not render them immutable: '"Vested rights, of course, may be impaired 'with due process of law' under many circumstances. The state's inherent sovereign power includes the so-called 'police power' right to interfere with vested property rights whenever reasonably necessary to the protection of the health, safety, morals, and general well being of the people.... The constitutional question, on principle, therefore, would seem to be, not whether a vested right is impaired by a marital property law change, but whether such a change reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment."' [Citations.] [q!] In determining

whether a retroactive law contravenes the due process clause, we consider such factors as the significance of the state interest served by the law. the importance of the retroactive application of the law to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions." (Id., at p. 592, fns. omitted.) Thus, the fact Bouquet dealt only with judgments not yet final is really a distinction without a difference.

Second, Mueller did more than rely on Bouquet. Mueller's premise is "[a]bsent an indication of any purpose upon the part of the state authority (whether legislative or judicial) to

evade some prior decision of the United States Supreme Court or Federal Congress, the principles of finality protecting the parties to this litigation (res judicata or collateral estoppel) are, within the broad limits of fundamental fairness, solely the concern of state law....[q!] If it be assumed arguendo there is a 'taking' by the legislative negation of the finality of a judgment, such taking may be constitutional where public policy and fairness considerations are great. Thus, the Legislature may modify the doctrine of res judicata, allow relitigation, for reasonable public policy grounds or other 'rational base[s].' [Citations.]" (Mueller v. Walker, supra, 167 Cal.App.3d 600, 607.)

This same analysis was recently employed by our Supreme Court in In re

the Marriage of Buol (1985) 39 Cal.3d 751 in considering newly enacted section 4800.1. The court held its retroactive application would impair vested property rights without due process of law. The court recognized the Legislature clearly intended the statute to operate retroactively. "Legislative intent, however, is only one prerequisite to retroactive application of a statute." (Id., at p. 756.) The court found the property right in question was vested, but as in In re the Marriage of Bouquet, supra, 16 Cal.3d 592, the Buol court concluded "[v]ested rights are not immutable; the state, exercising its police power may impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people." (In re the Marriage of Buol, supra, at pp. 760-761.)

I conclude the Legislature legitimately exercised its police power in enacting Civil Code section 5124. Unlike other situation where the retroactive application of legislation or case law might bring havoc, we deal with only an 18-month period. This legislation does not give new rights to the parties; it merely restores what was theirs.

I would remand the matter to the trial court for a hearing so the final judgment may be "modified to include a division of [husband's] military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983." (Sec. 5124.)

CERTIFIED FOR PUBLICATION

s/SONENSHINE
SONENSHINE, J.

1/ "FUSFSPA" (10 U.S.C. sec. 1408). The lengthy section is set forth verbatim in the appendix.

2/ That section reads as follows:

"(a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983.

"(b) Modification of community property settlements, judgments, or decrees under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement, judgment, or decree became final, divisible community property.

"(c) Any proceeding brought pursuant to this section shall be brought before January 1, 1986.

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date."

3/ McCarty v. McCarty (1981) 453 U.S. 210.

Dissenting
Foot Notes

1/ Moreover, the majority's conclusion is the anomaly. As a result of its holding, the appellant is the only reported factually similar litigant in the United States who is precluded from laying claim to her share of her spouse's nondisability retirement pay. In the reported cases discussed, ante, the nonservice spouse was allowed to reopen or reexamine a judgment finalized in the window period.

2/ Mueller v. Walker (1985) 167 Cal.App.3d 600 addressed a judgment which became final in the window period. Relying upon authorities addressing only interlocutory orders, Mueller states, "Despite the intention FUSFSPA be applied retroactively in order to abrogate all application of the McCarty decision, FUSFSPA has been held applicable only to those cases not yet final as of its effective date, i.e., February 1, 1983." (Id., at p. 605.) The court then opined, without discussion, "FUSFSPA does not have retroactive application to allow reopening of a final judgment." (Ibid.) It allowed

modification based on Civil Code section 5124.

3/ This accords with decisions of our sister states whose pre-McCarty law provided for division of military retirement benefits and now reopen window period final judgments. (Edsall v. Superior Court (1984) 143 Ariz. 240, quoting applicable sections of the committee reports and stating, "Congress made it clear that in passing the Act, their intent was to wipe out the effects of McCarty on persons divorced in the interim period." (Id., at p. 898.); A.M. Smith v. A. Smith (Del.Fam.Ct. 1983) 458 A.2d 711, also relying upon the congressional intent of FUSFSPA and concluding, "Congress thereupon, legislatively vacated McCarty and clearly indicated an intention that persons who had been wronged by McCarty could reopen their cases if permitted under state law.... To do otherwise would be to carve out a category of people whose cases happened to be decided between June 25, 1981 and September 8, 1982 and deprive them of substantial property interests which all other similarly-situated litigants have b awarded." (Id., at pp. 714-715.); Harkins v. Harkins (N.M. 1983) 681 P.2d 722, reopening a stipulated final divorce decree entered after McCarty, but prior to the enactment of FUSFSPA, but finding it equitable under post-FUSFSPA law because wife had been awarded "lifetime alimony in lieu of a division of military retirement." (Id., at p. 723.)) These decisions are also predicated on existing state rules patterned after Federal Rules of Civil Procedure, rule 60, allowing relief from a final judg-

ment where "it is no longer equitable that the judgment should have prospective application; or...any other reason justifying relief from the operation of the judgment." (Burton v. Burton (Nev. 1983) 669 P.2d 703, reopening a final judgment pursuant to a statute similar to section 5124.)

4/ The majority bases its decision on the supremacy clause. It therefore did "not discuss the res judicata arguments raised by the [parties]." (Majority opn., ante, p. 8.)

5/ The Mueller court recognized the sanctity of res judicata but acknowledged it was within the Legislature's power to prevent its effect. "It is true as a general principle of law after the trial court has divided the property, and the judgment has become final, the court loses jurisdiction to modify or alter the division made." (Mueller v. Walker, supra, 167 Cal.App.3d 600, 605.) However, "by positive act the Legislature has superseded and modified the preclusive effect of the doctrine of res judicata...as applied to military retirement benefits in decrees or judgments or settlements which became final in the specified time frame." (Id., at p. 607

6/ Bouquet interpreted legislation which did not indicate whether it was to be applied retroactively. Here, of course, the very statutory language mandates its retroactivity.

APPENDIX 2

(FILED May 22, 1986)

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 3, Nos. G000326, G001329

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF COX

COX V. COX

Appellant's petition for review is DENIED.

Bird, C.J. and Mosk, J., are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed February 28, 1986, which appears at 178 Cal.App.3d

240. (Cal. Const. Art. VI, section 14; Rule 976, Cal. Rules of Court.)

Bird, C.J. and Panelli, J., are of the view the opinion should remain published.

Bird

Chief Justice

APPENDIX 3

Section 1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approve property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C 662(b)));

(ii) payment of alimony

(as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) specifically provide for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal had been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is

entitled (other than the retired pay of a member retired for disability under chapter 61 or this title) less amounts which--

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial. Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are no greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 or this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who,

on or before the date of a court order, was married to that member.

(b) For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as

property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may no treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the

territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pa of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the

date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of

the member and his spouse.

(3) Payments under this section shall not ve made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an

amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may no exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the

disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall--

(i) pay to that spouse the least amount of disposable retired or

retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount or disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4):

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of--

(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any

conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii)

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-serve basis. Such court orders and legal process shall be

satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may no exceed 65 percent of the disposable retire or retainer pay payable to such member.

(5) A court order which itself or because of previously served court

orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph

(4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has

been paid.

(f)(1) The United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

APPENDIX 4

CALIFORNIA CIVIL CODE section 5124

"(a) Community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of this state as it existed before June 26, 1981, and as it has existed since February 1, 1983.

"(b) Modifications of community property settlements, judgments, or decrees under this section may be granted whether or not the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or

otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement, judgment, or decree became final, divisible community property.

"(c) any proceeding brought pursuant to this section shall be brought before January 1, 1986.

"(d) This section shall remain in effect only until January 1, 1986, and on that date is repealed unless a later enacted statute which is chaptered before that date deletes or extends that date."

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-283

In The
Supreme Court of the United States
October Term, 1986

SYLVIA L. COX,

Petitioner,

v.

THOMAS C. COX,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I

Has petitioner presented any constitutional question which was preserved below?

II

Does 10 U.S.C. §1408, waiving federal preemption in limited circumstances and permitting division of military retired and retainer pay in accordance with state law, require California to open a final, nonmodifiable domestic relations judgment holding the service member's rights were not divisible and to grant the former spouse a portion of that pay?

III

Was 10 U.S.C. §1408 clearly intended to be retroactive as to nonmodifiable, final domestic relations judgments adjudicating interests in marital property?

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OPINION BELOW

The opinion of the California Court of Appeal, numbers G001329 and G000326, consolidated, was filed February 28, 1986 and appears in the California Official Advance Sheets, 178 Cal.App.3d 240, dated April 10, 1986. (The appendix to the opinion, 178 Cal.App.3d, at 253, containing legislative history relied upon by the Court of Appeal [Pet. Appendix 10-11] 178 Cal.App.3d, at 245, 257, was not included in petitioner's appendix.)

The California Supreme Court denied review on May 22, 1986 and ordered that the opinion not be published in the Official Reports which follow the Advance Sheets by several months. Cal. Rules of Court, rule 976, subd. (c)(2). (The opinion may not "be cited or relied upon" in other cases. Id., rule 977, subd. (a).)

CONSTITUTIONAL PROVISION

No constitutional provision has been invoked. Only a statute is cited despite the requirement of rule 21.1(f). Moreover, the statement of the case does not state where and how a federal question was first raised and preserved, as required by rule 21.1(h), no doubt because petitioner did not raise such an issue below, even after the opinion of the Court of Appeal.

STATEMENT OF THE CASE

Mr. Cox retired from active duty with the United States Marine Corps as a Lieutenant Colonel, receiving longevity retirement. He was married to petitioner during his active service.

Their marital dissolution trial was held August 28, 1981 and judgment was entered November 18, 1981. Respondent's retirement benefits were "awarded to him as his separate property" in the judgment. [Clerk's Transcript 4] California courts in marital dissolution proceedings may divide community property, Cal. Civil Code, §4800, subd. (a), and may confirm the separate property of the parties to them. *Porter v. Superior Court*, 73 Cal. App.3d 793, 801-803 (1977). No appeal was filed, Cal. Rules of Court, rule 2, subd. (a), and the property division became final; it could not be modified. *Decker v. Occidental Life Ins. Co.*, 70 Cal.2d 842, 848 (1969).

After Congress enacted USFSPA, 10 U.S.C. §1408, petitioner moved on March 30, 1983 to "set aside" the portion of the judgment confirming respondent's separate property interest. She relied on California Code of Civil Procedure section 1008,[1] permitting motions to reconsider an order within ten days of the order based on

1. California Code of Civil Procedure, section 1008, subdivision (a): "When an application for an order has been made to a judge, or to the court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within ten (10) days after knowledge of the order and based upon an alleged different state of facts may, (sic) make application to the same judge who made the order, to reconsider the matter and modify, amend or revoke the prior order."

new facts, and she relied upon a change of law, USFSPA, giving "state courts authority to treat military retirement pay . . . as community property . . ." [Clerk's Transcript 16, lines 15-17] The motion was denied.

No grounds were stated in the minutes denying the motion and no reporter's transcript was made part of the record on appeal. (She was not within ten days under California Code of Civil Procedure section 1008; California law does not permit modification of final property judgments, *Henn v. Henn*, 26 Cal.3d 323, 332 (1980) (if the retirement had not been mentioned in the judgment, it could have been partitioned in a separate action); and a change in law is not grounds for opening a final judgment. *Slater v. Blackwood*, 15 Cal.3d 791 (1975); *In re Marriage of Fellers*, 125 Cal.App.3d 254, 256-258 (1981) (could not open pre-*McCarty* judgment dividing military retirement to declare it separate property under *McCarty*).)

No constitutional claim was made in that motion and she did not contend that any federal right would be denied her if the judgment were not vacated.

On January 1, 1984, California Civil Code section 5124 [Pet. Appendix 63] became effective. It provided a remedy of modification of judgments to divide military retirement rights payable after *McCarty*, a remedy not previously available as to any rights. *Henn v. Henn, supra*, 15 Cal.3d, at 332. (Section 5124, subdivision (b), purports to permit division whether or not the judgment reserved jurisdiction over the rights, omitted any reference, or assumed the rights were not community property. Respondent contended that the statute does not apply to final

judgments adjudicating those rights, certainly is not expressly applicable.)

Petitioner again moved to set aside the judgment; the same relief requested before. (Query: Is that a request for modification?) Petitioner again relied on California Code of Civil Procedure section 1008; newly discovered law, because of the change in law, and USFSPA granting "authority" to divide military retirement, in addition to California Civil Code section 5124. Again, no constitutional right was claimed and no argument was made that USFSPA required opening final, nonmodifiable judgments.

The motion was denied. Again, the court minutes stated no grounds for denial and no reporter's transcript was made part of the record on appeal.

In her Supplemental Brief on Appeal, p. 3, petitioner raised three issues: (1) do USFSPA and California Civil Code section 5124 "permit modification"; (2) does California treat military retirement as community property; and (3) would modification violate due process [respondent husband's due process rights]? No contention was made that denying modification—she had sought to vacate—would deny her due process, or any other constitutional or statutory right. She did not contend that USFSPA was mandatory on the states.

The Court of Appeal affirmed. The court held that USFSPA was not intended to be retroactive as to final judgments [Pet. Appendix 8] in the absence of clear expression of that intent, as required by established rules of statutory construction. [Pet. Appendix 6-13]

Petitioner did not exercise her right to petition for a rehearing. Cal. Rules of Court, rule 27, subd. (a). She

did ask the California Supreme Court to review the case, but again did not raise any federal constitutional issues. Her Petition for Review cited no constitutional provision, no federal statutes except the permissive USFSPA, and no opinion of this Court except *McCarty*. Petitioner argued that USFSPA was to be retroactive, but did not assert that there was a requirement of retroactivity as to final judgments. No claim was made that she had been denied any constitutional rights.

No claim was made at any point below that petitioner had especially set up or claimed any title, right, privilege, or immunity under the United States Constitution. 28 U.S.C. §1257, subsec. (3).

SUMMARY OF ARGUMENT

No constitutional question was raised below by petitioner and none is presented in her petition for a writ of certiorari.

The federal statute, 10 U.S.C. §1408, contains no language compelling states to divide military retirement benefits in domestic relations proceedings, let alone requiring that final, nonmodifiable judgments be opened. To the contrary, the Conference Committee report on the final bill specifically stated that courts should not reopen final judgments which had not divided military retirement.

Rather, the statute partly waives federal preemption of the field, under specified circumstances and conditions, so a state "may" divide military retirement in accordance

with state law. No federal right was created. Under California law when the judgment became final, there was no procedure to modify the property division.

Settled principles of statutory construction and the protection traditionally given rights vested under final judgments militate against opening this final judgment. Only issues of state marital property law and procedure are presented and none of petitioner's constitutional rights were abridged.

ARGUMENT

I

THE COMMUNITY PROPERTY RIGHTS ASSERTED BY PETITIONER ON PUBLIC POLICY GROUNDS ARE CALIFORNIA DOMESTIC RELATIONS ISSUES, NOT CONSTITUTIONAL RIGHTS NOR GUARANTEES OF FEDERAL LEGISLATION

A

No constitutional claim has been presented

Failure to state or argue any constitutional ground in the petition means there are no questions to be decided here. Rule 21.1(a); *Mazer v. Stein*, 347 U.S. 201, 206, n.5 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954). Jurisdiction is lacking. Rule 21.1(h).

It would be manifestly unfair to deal with questions never raised here nor below which respondent never had an opportunity to address. Respondent can only speculate as to the supposed claims and grounds asserted.

Questions of public policy and domestic relations matters are for state courts, and conflicts between courts in California are to be resolved by the California Supreme Court. Cal. Rules of Court, rule 29, subd. (a); *People v. Davis*, 147 Cal. 346, 348 (1905).

The petition should be denied for want of a constitutional question.

B

USFSPA waived federal preemption under specified circumstances and conditions, but did not require states to divide any property

The language of 10 U.S.C. §1408 is only permissive. States are not required to divide any military retirement benefits. Subject to specified limitations, a state court "may" divide disposable pay as marital property "in accordance with the law of the jurisdiction." [Subsec. (c)(1); Pet. Appendix 48-49].

To keep USFSPA in context, some state courts, including California, *In re Marriage of Fithian*, 10 Cal.3d 592 (1974), divided some military retirement benefits between service members and their former spouses. In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that federal law had preempted the field and precluded division. In response, Congress enacted USFSPA waiving preemption under limited circumstances and conditions.

A judgment dividing retired or retainer pay must be in accordance with state law [subsec. (a)(2)(A); Pet. Appendix 43]; only "disposable" pay may be divided [subsecs. (a)(2)(C), (a)(4); Pet. Appendix 44-45]; the spouse's interests may not be transferred or inherited [subsec. (c)

(2); Pet. Appendix 49]; and jurisdiction must be acquired when the service member is domiciled in the forum state, resides there for other than service reasons, or consents to jurisdiction. [Subsec. (c)(4); Pet. Appendix 49-50] These provisions differ in many respects from California law dividing other pensions.

Given the specific, limited waiver of preemption and the permissive language allowing division in accordance with state law, it is difficult to see how Congress has conferred any right upon petitioner. Absent abridgement of some federal right, there is no constitutional right to invoke. There is no constitutional claim raised at bar.

II

USFSPA WAS NOT INTENDED TO BE RETROACTIVE TO OPEN FINAL JUDGMENTS NOT MODIFIABLE UNDER STATE LAW

A

Congress did not intend to reopen final, nonmodifiable judgments

State law governs divisions of marital property by the terms of the statute. 10 U.S.C. §1408(c)(1); [Pet. Appendix 48-49] Nothing compels any action, let alone compels opening final, nonmodifiable judgments, whenever entered. Again, but importantly, the statute merely waived preemption. It did not affirmatively create rights.

The California Court of Appeal recognized that Congress did not intend reopening of final judgments which had already awarded all retirement rights to the retired service member. [Pet. Appendix 9-11] Indeed, the legislative intent was quite explicit in the Conference Committee report: "(T)he courts should not favorably consider applications based on the enactment of this title to reopen cases finalized before the McCarty decision wherein military retired pay was not divided."[2] Cong. Record-House (Aug. 16, 1982) H6000; 178 Cal.App.3d at 259; Opinion Appendix.

A respected community property commentator concluded the "(l)egislative history of USFSPA shows a congressional intent to wipe out the effect of *McCarty* with respect to nonfinal decrees." W. Reppy, Reconsidering the Rules for Military Benefits, 5 *A.B.A. Family Advocate*, 30, 33 (Spring 1983). Petitioner relies on an earlier Senate report, not the final Conference Committee. [Petition 10-11] Nothing shows a congressional intent to deprive respondent of his rights vested under the nonmodifiable California judgment at bar.

B

The statute is not made retroactive by its language

Settled canons of statutory construction, *Hassett v. Welch*, 303 U.S. 303, 314, n.19 (1938), provide that a statute will not be given retroactive effect where that is "not required by express command or by necessary and unavoid-

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2. This language was in the Appendix to the California Court of Appeal opinion, and was relied upon by that court, but that Appendix was not included in petitioner's appendix here. See 15 Cal.App.3d 245, 259, Official Advance Sheets, available despite depublication. The paperback Advance Sheets are published before the California Supreme Court acts and will be replaced eventually by hardbound volumes with depublished opinions deleted.

able implication." *Murray v. Gibson*, 15 How. (56 U.S.) 421, 423 (1853).

This Court works against giving retroactive applications which will deprive private rights, *United States v. Schooner Peggy*, 1 Cranch (5 U.S.) 103, 110 (1801), especially where the rights have been adjudicated. "When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it." *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. (59 U.S.) 421, 431 (1855); *cf., Pope v. United States*, 323 U.S. 1, 8-9 (1944). Where vested rights under a judgment might be taken away by retroactive application of a statute which clearly changes previously declared judicial doctrine (federal preemption, nonmodifiable state judgments), there is even greater reason not to give retroactive application. Cf., *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 496 (1968).

Congress could not have intended to compel all states to divide military retirement. The statute permits states not to do so. Construing that statute as compelling division, particularly by opening final judgments, would turn the *McCarty* preemption holding into a tool prying open countless judgments (and contracts) applying *McCarty* or applying pre-*McCarty* state law.

Surely such drastic effect should not be inferred from the merely permissive language. (Nothing at issue affects the fact-finding process. *Roberts v. Russell*, 392 U.S. 293, 294 (1968).) To do so would raise a host of practical, legal, and constitutional problems.

Congress did not intend to wreak havoc on state jurisprudence merely by waiving some former preemption.

The language of the statute does not say so and the legislative history says not.

III

NO IMPORTANT ISSUE HAS BEEN RAISED

Finally, petitioner has not demonstrated any special and important reasons for granting certiorari. Rule 17.1.

A decision would be limited to few cases: only cases (1) arising during a limited time period between *McCarty* and USFSPA, June 25, 1981 to February 1, 1983, and then only as to those (a) which became final, and (b) awarded military retirement as the service member's separate property (some courts may have anticipated USFSPA), and only as to those (2) final judgments from states where there was no procedural provision for opening the marital judgment. (Some states allowed it. *Edsall v. Superior Court*, 143 Ariz. 240, 693 P.2d 895, 898[2] (1984); *Smith v. Smith*, 458 A.2d 711 (Del. Fam. Ct. 1983).)

The opinion below will not be published in a permanent Official Report, so it will have no effect on the development of the law. Ultimately, of course, the substantive issues and policies are matters of domestic relations law, the province of state courts.

Hearing this case is neither a necessary nor an appropriate use of judicial resources.

CONCLUSION

Both the language of the statute and congressional intent show that USFSPA does not require California to open a nonmodifiable final judgment. The petition should be denied on the merits as well as for failure to raise and preserve constitutional questions.

Respectfully submitted,

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OPINION

SUPREME COURT OF THE UNITED STATES

SYLVIA L. COX *v.* THOMAS C. COX

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 86–293. Decided November 17, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

This Court, in *McCarty* v. *McCarty*, 453 U. S. 210 (1981), held that federal law precludes a state court from dividing military retired pay pursuant to state community property laws. Congress, concerned with the effect our holding would have on the divorced spouses of retired military personnel, enacted the Uniformed Services Former Spouse's Protection Act, Pub. L. 97–252, 96 Stat. 718, 730, 10 U. S. C. § 1408. That Act, in effect, nullified our decision in *McCarty* and permitted states to treat military retired pay as either the property of the military member or as property of both the member and his spouse. California enacted 1983 Cal. Stats., ch. 775, Cal. Family Law Code Ann. § 5124 (West) (effective up to January 1, 1986). In so doing, the California Legislature declared that California would return to its pre-*McCarty* practice of treating military retired pay as community property.

This case presents the question of whether USFSPA is to be given retroactive effect. In other words, is that Act to be read to permit spouses, whose divorce decrees were made final after our decision in *McCarty* but before USFSPA was enacted, to set aside that part of their divorce decrees denying them a share in a military pension because of our holding in *McCarty*. Petitioner in this case attempted to set aside her divorce decree which became final during the period of time between our decision in *McCarty* and enactment of USFSPA. The California Court of Appeal held that USFSPA is not to be given retroactive effect. Other state courts which have considered this question have come to a different conclusion. *E. g.*, *Edsall* v. *Superior Court*, 143 Ariz. 240, 693 P. 2d 895 (1984); *Smith* v. *Smith*, 458 A. 2d 711 (Del. Fam. Ct. 1983). Because of this confusion, and because the answer to the question presented turns on an interpretation of a federal statute, I would grant the petition for certiorari.